FILE COPY

FILED
JAN 1
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 356.

THE UNITED STATES OF AMERICA, *Petitioner,*

v.

HOME TITLE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

SATTERLEE & SPENCE,
Attorneys for the Respondent,
52 William Street,
New York.

HUGH SATTERLEE,
I. HERMAN SHER,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

	PAGE
Opinions below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	3
Summary of argument	7
Argument	9
I. The respondent was organized and has always operated as an insurance company under the Insurance Law of the State of New York and could not issue any of its policies if not so organized and operated	9
II. The fact that the State of New York recognizes and regulates the respondent as an insurance company and its business as insurance controls the respondent's classification as an insurance company	11
III. The respondent derived most of its net income from title insurance	13
A. The sums which the respondent received for guaranteeing titles and for services and disbursements necessary or incidental thereto were for insurance	13
B. Most of the respondent's net income consisted of sums received by it for guaranteeing titles and for services and disbursements necessary or incidental thereto, and its net income from the guaranty of mortgages was of minor importance	14
C. The respondent derived no income from its loans on and sales of mortgages except as incidental to its guaranties	20
IV. Substantially all of the respondent's income was subject to tax under Section 246 of the 1921 and 1924 Acts	22

PAGE

A. If the respondent's receipts from the guaranty of mortgages were from insurance, all of its income was subject to tax under Section 246.... 22

B. Even if the respondent's receipts from the guaranty of mortgages were not from insurance, substantially all of its income would still be subject to tax under Section 246..... 22

V. Section 246 of the 1921 and 1924 Acts is applicable to all insurance companies other than life or mutual insurance companies, whether or not all of their income is taxable thereunder..... 24

A. The statutes do not define insurance companies taxable under Section 246, but include in its application every insurance company other than a life or mutual insurance company..... 24

B. Insurance companies other than life or mutual insurance companies are taxable under Section 246 even though they receive income not taxable thereunder..... 26

VI. The respondent's guaranty of the payment of mortgages constitutes insurance..... 37

A. The respondent guarantees the payment of the debts of mortgagors and bears the risk of noncollection from them, for which it receives a premium 38

B. The respondent's guaranty of payment constitutes a contract of suretyship..... 40

C. Because the respondent is a corporate surety for profit with respect to its guaranties of payment, such guaranties constitute insurance..... 42

D. The respondent's guaranty of payment is a contract of indemnity in the sense in which indemnity is essential to a contract of insurance 44

E. Congress has itself classified the guaranty of mortgages as insurance and has taxed mortgage guaranty policies as insurance policies.... 45

Conclusion 46

Appendix A—Sections of New York Insurance Law..... 47

Appendix B—Legislative history of Sections 243 and 246.... 52

Table of Cases.

	PAGE
Adair Realty & Trust Co., *In re*. 35 Fed. (2d) 531	42
Alliance Ins. Co. of Philadelphia *v.* MacLaughlin, 49 Fed. (2d) 361, 362	27
Allin *v.* Motorist's Alliance of America, 234 Ky. 714, 29 S. W. (2d) 19	40
Barney *v.* Bond & Mortgage Guarantee Co., 118 Misc. (N. Y.) 241, 193 N. Y. Supp. 19	39
Black Co. *v.* London Guarantee & Accident Co., 216 N. Y. 560, 563	20
Bowers *v.* Lawyers Mortgage Company, No. 355, October Term, 1931	6
Community Bldg. Co. *v.* Maryland Casualty Co. (C. C. A.), 8 Fed. (2d) 678	40
Cumpston *v.* McNair (1828), 1 Wend. (N. Y.) 457	41
Davis *v.* Wells (1881), 104 U. S. 159	41
Dayton Rubber Mfg. Co. of Delaware *v.* Sabra, (C. C. A.), 31 Fed. (2d) 9	40, 42
First Nat. Bank *v.* Jones, 219 N. Y. 312	42
Gans *v.* McGowan, 41 App. Div. 461	39
Gibbs *v.* Common (1822), 9 Searg. & Rawle (Pa.) 198, 201	41
Gindre *v.* Kean, 7 Misc. 582, 28 N. Y. Supp. 4, 5	39
John Hancock Mutual Life Ins. Co. *v.* Commissioner of Internal Revenue, 10 B. T. A. 736	33
Home Title Insurance Company *v.* United States, 50 Fed. (2d) 107	21, 42, 44
Hunt *v.* New Hampshire Fire Underwriters Ass'n, 68 N. H. 305, 38 Atl. 145, 147	38
Independent Life Insurance Co. *v.* Commissioner of Internal Revenue, 17 B. T. A. 757	33
Loeb *v.* Hellman, 83 N. Y. 601, 602-603	39
Loos *v.* McCormack, 107 App. Div. 8, 93 N. Y. Supp. 1088	39, 42
Lumber Mutual Fire Insurance Co. *v.* Malley, 44 Fed. (2d) 553	26
Massachusetts Protective Ass'n, Inc. *v.* Commissioner, 18 B. T. A. 810	32, 35
Miller *v.* Reinhart, 119 N. Y. 368, 378-379	39
Mortgage Guarantee Co. *v.* Welch, 38 Fed. (2d) 184	37

PAGE

Northwestern Mutual Life Ins. Co. *v.* Roberts, 177 Cal. 540, 171 Pac. 313, 314 26

Oxford Bank *v.* Haynes (1825), 25 Mass. (8 Pick.) 423, 428 .. 41

Pan-American Bank & Trust Co. *v.* National City Bank, 6 Fed. (2d) 762, certiorari denied 269 U. S. 554 40
People v. Potts, 264 Ill. 522, 106 N. E. 524 ..... 38, 43
People *v.* Rose, 174 Ill. 310, 51 N. E. 246 43
Peterson *v.* Miller Rubber Co. of New York (C. C. A.) 24 Fed. (2d) 59, 61 41

Ramsey & Gatlin Construction Co., *et al. v.* Vincennes Bridge Co., 283 U. S. 796 40

State *v.* Chicago Bonding & Surety Co., 279 Mo. 535, 215 S. W. 20, 25 43
State *v.* McAvoy, 40 R. I. 437, 450-452, 101 Atl. 109 40
Sturtevant Co., B. F. *v.* Fidelity & Deposit Co. of Maryland, 285 Fed. 367 40

Tidewater Coal Exchange, Inc. *v.* New Amsterdam Casualty Co., 20 Fed. (2d) 951 43
Town of Whitestown *v.* Title Guaranty & Sur. Co., 72 Misc. Rep. 498, 131 N. Y. S. 390, 393 (aff'd. 148 App. Div. 900, which was aff'd 209 N. Y. 12) 43
Transcontinental Petroleum Co. *v.* Interocean Oil Co., 262 Fed. 278, 283 41
Trenton Potteries Co. *v.* Title Guarantee & Trust Co., 50 App. Div. 490, 64 N. Y. Supp. 116, 117 10

United States *v.* Cambridge Loan & Building Co., 278 U. S. 55 12

Wallace *v.* Castle, 14 Hun 106 39
Wayne Oil Tank & Pump Co. *v.* Stoltz, 163 N. Y. Supp. 601 42
Western Casualty Co. *v.* Commissioner, 20 B. T. A. 738 33

Young *v.* American Bonding Co., 228 Pa. 373, 77 Atl. 623 43

STATUTES.

Insurance Law of the State of New York:

Article 5 9
Section 1 48
Section 2 49
Section 10 49

	PAGE
Section 11	49
Section 21	50
Section 24	50
Section 39	50
Section 44	50
Section 170	9, 47
Section 176	47
Judicial Code, Section 128 (a)	1
New York Laws 1914, Chap. 369	6
Revenue Act of 1909, Section 38, 36 Stat. 112	28
Revenue Act of 1913, Section G, 38 Stat. 114, 166	28
Revenue Act of 1916, Section 10, c. 463, 39 Stat. 756	28
Revenue Act of 1916, Section 12, c. 463, 39 Stat. 756	28
Revenue Act of 1917, Section 1206, 40 Stat. 300	28
Revenue Act of 1918, c. 18, 40 Stat. 1057:	
Section 1	28
Section 230 (a)	28
Section 231 (4)	11
Section 232	28
Section 233 (a)	28
Section 503 (c)	45
Title XI, Schedule A	45
Revenue Act of 1921, c. 136, 42 Stat. 227:	
Section 231 (4)	11
Section 242	25
Section 243	2, 24, 25
Section 244	25
Section 245	25
Section 246	1, 2, 24, 25
Section 247	2, 3, 25
Section 1000	2, 24, 25
Revenue Act of 1924, c. 234, 43 Stat. 253:	
Section 242	25
Section 243	2, 24, 25
Section 244	25
Section 245	25
Section 246	1, 2, 24, 25
Section 247	2, 25
Section 700	2, 24, 25
Revenue Act of 1928, Section 204 (b) (1) (B), c. 852, 45 Stat. 791	27

REGULATIONS AND MISCELLANEOUS.

	PAGE
Regulations 33 (revised), Paragraph 673	28
Regulations 33 (revised), Paragraph 674	28
Regulations 45, Art. 548	28
Conference Report on the Revenue Bill of 1918, 65th Cong., 3rd Sess., House Rep. No. 1037, p. 60	29
Conference Report on the Revenue Bill of 1921, 67th Cong., 1st Sess., House Rep. No. 486, pp. 39-41	30, 59
Cong. Record, 67th Cong., 1st Sess., Vol. 61, pp. 6982-6983	30
Hearings before the Committee on Ways and Means, House of Representatives, 65th Cong., 2d Sess., on the proposed Revenue Act of 1918, Part I, pp. 791-843, including memorandum on behalf of 111 life insurance companies	29, 52
Hearings before the Committee on Finance of the Senate on the proposed Revenue Act of 1921, 67th Cong., 1st Sess.—Statement on behalf of the Association of Life Insurance Presidents, p. 594	29, 58
House Report, 67th Cong., 1st Sess., No. 350, p. 14	30
G. C. M. 5355, VII-2 C. B. 160	13, 14, 32, 36
I. T. 1981, III-1 C. B. 311	36
Op. Atty. Gen. (1893) 308 (N. Y.)	10
Op. Atty. Gen. (1912) 345 (N. Y.)	10
Op. Atty. Gen. (1918) 15 St. Dept. Rep. 551 (N. Y.)	6, 10
Proceedings of the Fourteenth Annual Meeting of Life Insurance Presidents, pp. 140-141, 143-145	29
Radin on Guaranty and Suretyship, 17 California Law Review 605-622, 18 id. 21-30	41
Report of Committee on Finance of the Senate on the proposed Revenue Act of 1921, 67th Cong., 1st Sess., Senate Report No. 275, p. 20	59
Senate Report, 65th Cong., 3rd Sess., No. 617, p. 9	29
Sol. Mem. 5501, V-1 C. B. 102	13, 19, 22, 23, 32, 36

In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 356.

THE UNITED STATES OF AMERICA, Petitioner,

v.

HOME TITLE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court (R. 23-29) is reported in 41 Fed. (2d) 793. The opinion of the Circuit Court of Appeals (R. 65-72) is reported in 50 Fed. (2d) 107.

JURISDICTION.

The jurisdiction of this Court is by virtue of Section 240(a) of the Judicial Code, as stated in the petitioner's brief.

QUESTION PRESENTED.

The question presented is whether the respondent was an insurance company (other than a life or mutual insurance company) and accordingly subject to the tax imposed by Section 246 of the Revenue Acts of 1921 and 1924, and consequently was not subject to the capital stock tax im-

posed by Section 1000 of the Revenue Act of 1921 and by Section 700 of the Revenue Act of 1924.

STATUTES INVOLVED.

The statutes involved are Sections 1000, 243, 246 and 247 of the Revenue Act of 1921 (Ch. 136, 42 Stat. 227), and Sections 700, 243, 246 and 247 of the Revenue Act of 1924 (Ch. 234, 43 Stat. 253), which are respectively similar to the corresponding provisions of the 1921 Act.

Sections 1000, 243, 246 and 247 of the Revenue Act of 1921 are in part as follows:

> SEC. 1000. (a) That on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918—
>
> (1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included: * * *
>
> (b) The taxes imposed by this section shall not apply in any year * * * to any insurance company subject to the tax imposed by section 243 or 246.
>
> SEC. 243. That in lieu of the taxes imposed by sections 230 and 1000 and by Title III, there shall be levied, collected, and paid for the calendar year 1921 and for each taxable year thereafter upon the net income of every life insurance company a tax as follows: * * *
>
> SEC. 246. (a) That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, col-

lected and paid for the calendar year 1922, and for each taxable year thereafter, upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows: * * *

SEC. 247. (a) That in computing the net income of an insurance company subject to the tax imposed by section 246 there shall be allowed as deductions: * * *

STATEMENT.

The facts were stipulated (R. 12-22; 46-56) and were found by the District Court as stipulated (R. 29). They are fairly presented in the opinion of the Circuit Court of Appeals (R. 65-72), and are merely summarized here.

The respondent was incorporated in 1906 under the Insurance Law of the State of New York as a title guaranty corporation. It was organized with the name Home Title Insurance Company of New York, which in 1921 was changed to Home Title Insurance Company. In its petition to change its name the respondent stated its objects as follows:

> That your petitioner corporation was duly incorporated under the Insurance Law of the State of New York and the objects for which it was formed are to examine and guarantee title to real estate, to lend money on real estate mortgages and to guarantee such mortgages as to payment of principal and interest and to do the work generally of a title insurance company.

(R. 12, Ex. A.)

Since the date of its organization the plaintiff has at all times been subject to examination by, and the supervision of, the Superintendent of Insurance of the State of New

York, and to all the provisions of the Insurance Law of that State applicable to title and credit guaranty corporations organized thereunder, and is, and has always been, required to file, and has filed annually, with the Superintendent of Insurance, on forms approved by him, the statements required by law. The plaintiff has always complied with the Insurance Law of the State of New York and the regulations of its Insurance Department, and has maintained a guaranty fund pursuant to the provisions of Article V of the Insurance Law. (R. 14, 21.)

The respondent's business has always consisted of its issuance of two kinds of contracts or policies, namely:

(a) Those in which it merely guarantees the title to real estate; and

(b) Those in which it guarantees (1) the title to the real estate covered by a mortgage and (2) the payment of the principal and interest of the bond and mortgage. (R. 17, 18, 48-54.)

When the respondent issued policies which merely guaranteed the titles to real estate, it also, as preliminary steps thereto, examined and prepared abstracts of titles, made searches, and procured information in relation thereto. For such policies the respondent received fixed charges, based on a scale dependent upon the amount of the policy, for (1) examination, (2) conveyancing, (3) recording, (4) survey, (5) tax search, and (6) taxes. (R. 17, 20, 48.)

When the respondent issued policies which guaranteed both the title and payment of the mortgage, it also, as necessary and incidental steps thereto, examined the title to the property involved, appraised the value of such property, and made all necessary inspections, examinations, etc. In connection with said policies the respondent re-

ceived (*a*) all fees and charges which it received in connection with the policies which merely guaranteed titles, that is, items (1) to (6) above; (*b*) a fee for inspection and appraisal of the property; and (*c*) an annual interest differential, known in the community as a "premium", which generally amounted to one-half of one per cent. of the face amount of the bond. (R. 17, 18; 20; 50.)

As classified for the purpose of the annual statements to the Superintendent of Insurance the respondent's income consisted of premiums for title insurance and mortgage guaranties; fees chiefly for examinations; interest; and sundry items; and the outgo of losses, commissions, salaries, rents, office expenses, taxes, and interest. (R. 15.) As reallocated for the purpose of distinguishing between title insurance and mortgage guaranties the respondent's total income for the five years 1921-1925 from premiums and fees was as follows:

(1) Mortgage guaranty premiums	$734,060.15
(2) Other mortgage guaranty fees	627,548.51
(3) Title insurance fees where no mortgage guaranty	2,532,927.00
(4) Title insurance fees where mortgage guaranty also	928,755.62
(5) Mortgage renewals	159,147.03
(6) Conveyancing fees	136,341.25
(7) Charges for searches	44,284.53
(8) Recording fees	29,520.24
(9) Charges for surveys	4,621.35

(R. 19, 20.)

The amount of (1) title insurance written by the respondent without guaranty of mortgages, and (2) the amount of mortgages guaranteed by the respondent, for each of the calendar years 1921 to 1925 were as follows:

Year	Title insurance	Mortgages guaranteed
1921	$29,090,650	$4,359,346
1922	46,050,180	7,319,246
1923	67,138,820	7,989,950
1924	69,442,530	11,341,239
1925	87,965,580	13,214,092

The aggregate amount of title insurance written by the respondent, without guaranty of mortgages, outstanding during each of the years 1921 to 1925 was not less than $100,000,000. (R. 20, 21.)

The respondent has at no time had or sold any mortgages except those which it guaranteed, and its primary purpose in making loans has always been for the sale of the bonds and mortgages guaranteed as aforesaid. The respondent received no lending fees, and sold the mortgages at their face value. (R. 17-20.)

Guaranteed Mortgage Company and First Mortgage Guaranty Company, corporations incorporated under the Banking Law of the State of New York, have engaged in the business of making mortgage loans on real estate and selling mortgages, but only in part with their guaranty. The title to the property covered by such mortgages was insured by title insurance companies, corporations organized under the Banking Law not being entitled to insure titles to real estate. (R. 22; N. Y. Laws 1914, Chap. 369; Op. Atty. Gen. (1918), 15 N. Y. St. Dept. Rep. 551.)

The Lawyers Mortgage Company, the respondent in *Bowers* v. *Lawyers Mortgage Company*, No. 355, October Term, 1931, was engaged in guaranteeing mortgages, but none of its business consisted of title insurance. (*Bowers* v. *Lawyers Mortgage Company*; R. 9, 20, 57-63.)

Summary of Argument.

Section 1000 of the 1921 Act and Section 700 of the 1924 Act provide that the capital stock tax shall not apply to any insurance company subject to the tax imposed by Section 243 or 246. Section 243 imposes a tax upon the net income of every life insurance company and Section 246 imposes a tax upon the net income of every insurance company other than a life or mutual insurance company. The respondent is not a mutual insurance company. If then, the respondent is an insurance company of any other kind, it is not subject to the capital stock tax.

The respondent is an insurance company, and in particular a title insurance company, because

I. The respondent was organized and has always operated as an insurance company under the Insurance Law of the State of New York and could not issue any of its policies if not so organized and operated.

II. The fact that the State of New York recognizes and regulates the respondent as an insurance company and its business as insurance controls the respondent's classification as an insurance company.

III. The respondent derived most of its net income from title insurance.

A. The sums which the respondent received for guaranteeing titles and for services and disbursements necessary or incidental thereto were for insurance.

B. Most of the respondent's net income consisted of sums received by it for guaranteeing titles and for services and disbursements necessary or

incidental thereto, and its net income from the guaranty of mortgages was of minor importance.

C. The respondent derived no income from its loans on and sales of mortgages except as incidental to its guaranties.

IV. Substantially all of the respondent's income was subject to tax under Section 246 of the 1921 and 1924 Acts.

A. If the respondent's receipts from the guaranty of mortgages were from insurance, all of its income was subject to tax under Section 246.

B. Even if the respondent's receipts from the guaranty of mortgages were not from insurance, substantially all of its income would still be subject to tax under Section 246.

V. Section 246 of the 1921 and 1924 Acts is applicable to all insurance companies other than life or mutual insurance companies, whether or not all of their income is taxable thereunder.

A. The statutes do not define insurance companies taxable under Section 246, but include in its application every insurance company other than a life or mutual insurance company.

B. Insurance companies other than life or mutual insurance companies are taxable under Section 246 even though they receive income not taxable thereunder.

VI. The respondent's guaranty of the payment of mortgages constitutes insurance.

A. The respondent guarantees the payment of the debts of mortgagors and bears the risk of non-

collection from them, for which it receives a premium.

B. The respondent's guaranty of payment constitutes a contract of suretyship.

C. Because the respondent is a corporate surety for profit with respect to its guaranties of payment, such guaranties constitute insurance.

D. The respondent's guaranty of payment is a contract of indemnity in the sense in which indemnity is essential to a contract of insurance.

E. Congress has itself classified the guaranty of mortgages as insurance and has taxed mortgage guaranty policies as insurance policies.

Argument.

I.

The respondent was organized and has always operated as an insurance company under the Insurance Law of the State of New York and could not issue any of its policies if not so organized and operated.

Article V of the New York Insurance Law classifies title and credit guaranty corporations as insurance companies. A title and mortgage guaranty corporation, organized under Section 170 of Article V, may guarantee titles and the payment of bonds secured by mortgages. Such a corporation is subject to many limitations. (Insurance Law of New York, Appendix A hereto, pp. 47-51.)

The respondent's name is "Home Title Insurance Company". It was organized under Article V of the Insurance Law of the State of New York as a title and credit guaranty

corporation. The respondent, together with all of its business, has always been classified, regulated and supervised as an insurance company under said Insurance Law. (R. 12, 14, 21). The respondent has therefore been subject to the same restrictions as other insurance companies doing business in the State of New York. (*Trenton Potteries Co.* v. *Title Guarantee & Trust Co.*, 50 App. Div. 490, 64 N. Y. Supp. 116, 117.)

It has been held that a corporation organized under the Business Corporations Law of New York cannot engage in the business of guaranteeing titles, because the power to engage in such business is expressly conferred upon corporations incorporated under the Insurance Law (Op. Atty. Gen. (1912), 345); that, upon the same principle, a credit guaranty company, the object of whose business is to guarantee the payment of commercial paper, bonds, notes and other instruments for the payment of money, cannot organize under the Business Corporations Law (Op. Atty. Gen. (1893), 308); and that a surety company incorporated under Section 70 of the Insurance Law is not authorized to insure a mortgagee against loss by reason of a defect of title in the mortgaged premises, because such insurance is exclusively within the province of title guaranty companies incorporated under Section 170 of the Insurance Law. (Op. Atty. Gen. (1918), 15 St. Dept. Rep. 551.) A corporation organized under the Banking Law may not guarantee titles. (Op. Atty. Gen. (1918), 15 N. Y. St. Dept. Rep. 551.)

Accordingly, the respondent's guaranty of titles would have been unlawful, and therefore impossible, if it had not been incorporated and regulated as an insurance company under the Insurance Law.

Every policy of mortgage guaranty issued by the respondent included its guaranty of the title to the real estate upon which the mortgage was placed. The issuance of such policies of mortgage guaranty would therefore have been unlawful if the respondent had not been incorporated and regulated as an insurance company under the Insurance Law.

Inasmuch as the respondent engaged in no business other than the writing of title and mortgage guaranty policies, it would have been unable to carry on any of its business if it had not been incorporated and regulated as an insurance company under the Insurance Law of New York.

II.

The fact that the State of New York recognizes and regulates the respondent as an insurance company and its business as insurance controls the respondent's classification as an insurance company.

Section 231 of the Revenue Act of 1918 exempted from the income tax "(4) Domestic building and loan associations and cooperative banks without capital stock organized and operated for mutual purposes and without profit". Section 231 of the Revenue Act of 1921 exempted from the income tax "(4) Domestic building and loan associations substantially all the business of which is confined to making loans to members; and cooperative banks without capital stock organized and operated for mutual purposes and without profit". Except as above described, the revenue acts did not define building and loan associations.

In the case of *United States* v. *Cambridge Loan & Building Co.*, 278 U.S. 55, the question was the scope to give to the statutory words. It appeared that the Cambridge Loan & Building Company was incorporated under the laws of Ohio, by which it was recognized as a building and loan association, and that it conducted its business in accordance with the laws of that State. However, it received a large proportion of its deposits from persons who were not members and paid interest thereon, and it also made considerable loans to such persons. Also, even when the borrower was a stockholder, he was required only to subscribe for from one to five shares, regardless of the amount of the loan. The Government argued (1) that the Company was therefore a mere money-making institution like an ordinary bank; (2) that the State of Ohio gave it a false name; and (3) that the Company's classification under the laws of Ohio was not controlling.

We are not here concerned with the Government's argument (1). It is here immaterial whether the corporation was a building and loan association or a mere money-making institution. Arguments (2) and (3), however, are important in the present case, and this Court's answer thereto establishes the principle which we think should govern the present case. That answer (Mr. Justice Holmes writing) was as follows (p. 59):

> "The present taxes are upheld by the Government on the ground that the respondent is such a mask. It is argued that even admitting all that has been said thus far, a State cannot make a bank exempt merely by calling it a building and loan association. No doubt extravagant cases might be imagined. But these associations are well known and a State is not likely to be party to a scheme to

enable a private company to avoid federal taxation by giving it a false name. The statutes speak of 'domestic' associations, that is, associations sanctioned by the several States. They must be taken to accept, with the qualifications expressly stated, what the States are content to recognize, unless there is a gross misuse of the name. The State of Ohio has recognized and still recognizes the respondent as belonging to the class which its name indicates. Very possibly the company has strained its privileges to near the limit, but we are not prepared to condemn the nomenclature adopted by the State."

III.

The respondent derived most of its net income from title insurance.

A. THE SUMS WHICH THE RESPONDENT RECEIVED FOR GUARANTEEING TITLES AND FOR SERVICES AND DISBURSEMENTS NECESSARY OR INCIDENTAL THERETO WERE FOR INSURANCE.

The petitioner concedes this (Brief 10). It concedes the correctness of the rulings of the Bureau of Internal Revenue in S. M. 5501, V-1 C. B. 102, and G. C. M. 5355, VII-2 C. B. 160.

In the first ruling a title guaranty corporation organized under the Insurance Law of the State of New York was held to be an insurance company within the meaning of Section 246 of the Revenue Act of 1924, although it appeared that of the total income of the corporation over 23 per cent. was attributable to interest, about 4 per cent. to appraisal and conveyancing fees, an unascertained part to searches, and the balance to title policies. The ruling stated in part as follows (V-1 C. B. 104):

"In view of all the foregoing, it is apparent that the income of the M Company is derived from the issuance of contracts of insurance and sources fairly incidental to what is an insurance business. It is true that a substantial part of the income of this company is derived from fees for searching and examining titles, not strictly insurance functions, yet it appears that these examinations are made solely as preliminary steps to the issuance of insurance contracts. This office is, therefore, of the opinion that a corporation so organized and operated is an insurance company within the meaning of section 246 of the Revenue Act of 1924 and entitled to file returns as an insurance company thereunder."

G. C. M. 5355, VII-2 C. B. 160, is in accord.

B. MOST OF THE RESPONDENT'S NET INCOME CONSISTED OF SUMS RECEIVED BY IT FOR GUARANTEEING TITLES AND FOR SERVICES AND DISBURSEMENTS NECESSARY OR INCIDENTAL THERETO, AND ITS NET INCOME FROM THE GUARANTY OF MORTGAGES WAS OF MINOR IMPORTANCE.

The respondent's gross income during the years in questions consisted of the following (R. 14, 15, 33):

Year	*Premiums, fees and charges*	*Interest and rent*	*Other income*
1921	$ 630,291.01	$ 69,565.22	$ 5,602.58
1922	925,596.83	103,194.57	29.37
1923	1,059,912.07	148,065.35	8,655.70
1924	1,160,895.92	191,173.88	18,752.93
1925	1,420,509.85	201,172.43	39,372.00

The premiums, fees and charges were received by the respondent in part for and in connection with (1) its issuance of policies which merely guaranteed the titles to real

estate, and (2) its issuance of policies which guaranteed both the title and payment of the mortgage (R. 17-18, 20, 48, 50-51). The petitioner apparently concedes (Brief 10) that if the respondent had not received the premiums, fees and charges for and in connection with its guaranty of mortgages, it would have been entitled to classification as an insurance company taxable under Section 246. An examination of these receipts (R. 19-20, 39), however, discloses that the greater part thereof is attributable to the respondent's guaranty of titles, and that the portion that is attributable to its guaranty of the payment of the mortgages is but a minor part of the respondent's entire income.

The stipulated facts show

1. That, as preliminary steps to its issuance of policies which merely guaranteed the titles to real estate, the respondent examined and prepared abstracts of titles, made searches and procured information thereto; and that in connection with each of said policies the respondent received fixed fees and charges, based on a scale dependent upon the amount of the policy, for (1) examination, (2) conveyancing, (3) recording, (4) survey, (5) tax search, and (6) taxes (R. 17, 20, 48); and

2. That, as necessary and incidental steps to its issuance of policies which guaranteed both the title and payment of the mortgage, the respondent examined the title to the property involved, appraised the value of such property, and made all necessary inspections, examinations, etc.; and that in connection with each of said policies the respondent received (*a*) all fees and charges which it received in connection with the policies which merely guaranteed titles, that is, items (1) to (6), inclusive, *supra*, (*b*) a fee for inspection and appraisal of the property, and (*c*) a premium

for its guaranty of the payment at maturity of the principal of the bond and a stated rate of interest (R. 17-18, 20, 50-51). In some instances the respondent received a fee for the renewal of mortgages, but the aggregate amount thereof is an insignificant part of the total fees received by the respondent (R. 15, 19, 33).

Accordingly, the premiums, fees and charges received by the respondent consist of nine separate items, namely, items (1) to (6), *supra*, which it received in connection with every policy issued by it; items (*b*) and (*c*), *supra*, which it received only when it issued policies which guaranteed both the title and payment of the mortgage; and fees for the renewal of mortgages. Said premiums, fees and charges for the years 1921 to 1925 consisted of the following (R. 19, 33):

	1921	1922	1923	1924	1925
(1) Mortgage guaranty premiums	$ 90,449.14	$ 105,750.03	$ 134,349.66	$ 175,641.39	$ 227,869.93
(2) Inspection and appraisal fees	88,679.75	139,830.45	115,658.86	133,549.10	149,830.35
(3) Title insurance fees where no mortgage guaranty	270,030.79	406,019.93	565,155.86	576,771.36	714,949.06
(4) Title insurance fees where mortgage guaranty also	131,243.75	206,945.45	171,172.14	197,649.23	221,745.05
(5) Mortgage renewals	28,940.83	30,123.35	30,557.75	24,745.35	44,779.75
(6) Conveyancing fees	13,544.25	26,008.93	27,779.00	33,668.40	35,340.67
(7) Charges for searches	3,693.77	6,497.46	7,945.91	11,398.30	14,749.09
(8) Recording fees	3,316.28	4,094.43	6,723.69	6,133.14	9,252.70
(9) Charges for surveys	392.45	326.90	569.20	1,339.65	1,993.25
Total	$630,291.01	$ 925,596.83	$1,059,912.07	$1,160,895.92	$1,420,509.85
Other income	75,167.80	103,223.94	156,721.05	209,926.81	240,544.43
Total income	$705,458.81	$1,028,820.77	$1,216,633.12	$1,370,822.73	$1,661,054.28

Items (1), (5), (6), (7), (8) and (9), respectively, in the above table are the amounts received by the respondent, and shown separately in its books, during the years in question from each of six of the nine items aforesaid. The respondent's books also show the amounts actually received

by it, exclusive of said items, from fees and charges in connection with its policies which merely guaranteed the title to the real estate, as given in the above table as item (3). However, except as stated, the respondent's books did not segregate, as between the various items, the amounts received by it in connection with the policies which guaranteed both the title and payment of the mortgage. Of said amounts, the parts attributed in the table at page 19 of the record to the guaranty of the title and guaranty of payment of the mortgage, respectively, are shown in the above table as items (4) and (2), respectively. The amounts so attributed were arrived at by allocating 59.677 per cent. of the total to the guaranty of the title, and the balance to the guaranty of payment of the mortgage. (R. 19.) Said percentage of 59.677 was arrived at in the following manner:

The fees and charges which the respondent received during the years 1921 to 1925 in connection with each of its policies which merely guaranteed the titles, where the amount of the insurance was $5,000, amounted, in the aggregate, to $74. The fees and charges which the respondent received during said years in connection with each of its policies which guaranteed both the title and payment of the mortgage, where the amount of the loan was $5,000, consisted of said $74 and an additional charge of approximately $50 for inspection and appraisal of the property, or a total of $124. The ratio which said $74 is to said $124 is 0.59677. (R. 20.)

The respondent's allocation of the fees and charges received by it during the years 1921 to 1925 was made by its officers in the light of their intimate experience and familiarity with the business and is reasonable on the face of it. The allocation forms part of the stipulated facts, and the petitioner made no attempt to introduce evidence to dis-

pute it. There is nothing in the record which shows or purports to show that said allocation is in any way incorrect. (R. 20.)

Accordingly, of the premiums, fees and charges received by the respondent during the years 1921 to 1925, the amounts which it received for and in connection with its guaranty of titles (items (3), (4), (6), (7), (8), and (9) in the above table) and its guaranty of the payment of mortgages (items (1), (2) and (5) in the above table), respectively, are, in the aggregate, as follows:

Year	*Guaranty of titles*	*Guaranty of mortgages*
1921	$422,221.29	$208,069.72
1922	649,893.00	275,703.83
1923	779,345.80	280,566.27
1924	826,960.08	333,935.84
1925	998,029.82	422,480.03

The total gross income, outgo and net income of the respondent for the years in question were as follows (R. 15, 33-34.):

Year	*Income*	*Outgo*	*Net income*
1921	$ 705,458.81	$ 599,072.36	$106,386.45
1922	1,028,820.77	806,894.12	221,926.65
1923	1,216,633.12	1,156,101.34	60,531.78
1924	1,370,822.73	1,263,837.20	106,985.53
1925	1,661,054.28	1,361,294.17	299,760.11

From the above tables it may be calculated that the premiums, fees and charges received by the respondent in connection with its guaranty of the payment of mortgages constitute on the average 29.6 per cent. of its total premiums, fees and charges and 25.8 per cent. of its total gross income, respectively; and that the net income of the respondent averages 13.5 per cent. of its gross income.

An examination of the expenses of the respondent during the years in question (R. 15, 34) discloses that it was not practicable for it to segregate them on its books of account as between its guaranty of titles and of the payment of mortgages, respectively; and it made no such segregation. (R. 22.) However, the net income of the respondent averaged less than 14 per cent. of its gross income; and it is obvious, therefore, that, since the amounts which it received from its guaranty of the payment of mortgages averaged less than 26 per cent. of its entire gross income, said amounts are but a minor and incidental part of its net income. Moreover, the fees for inspections and appraisals, which amounted to almost as much as the interest differential premiums, and which we have attributed above to receipts from mortgage guaranties, might fairly be regarded as incidental to the title guaranties (see S. M. 5501, V-1 C. B. 102, *supra*), thus nearly halving the income strictly attributable to the mortgage guaranty operations. Clearly, by far the most of the respondent's net income was derived by it from its guaranty of titles and sources reasonably incidental thereto.

Of the aggregate amount of policies issued by the respondent during the years in question (R. 21), over 86 per cent. consisted of policies which merely guaranteed the titles to real estate. The aggregate amount of title policies, which did not guaranty mortgages, outstanding during each of the years in question was not less than $100,000,000. (R. 21.) The respondent has always been known as a title insurance company. (R. 12.)

Undoubtedly, therefore, the respondent's guaranty of titles was to it the most important factor in its mortgage guaranty policies.

C. THE RESPONDENT DERIVED NO INCOME FROM ITS LOANS ON AND SALES OF MORTGAGES EXCEPT AS INCIDENTAL TO ITS GUARANTIES.

For his reasons for contending that the decision of the Circuit Court of Appeals in the present case is erroneous the Solicitor General largely relies on his brief for the petitioner in the Lawyers Mortgage Company case. Aside from the consideration that the contention of the petitioner in the present case is accordingly based upon references to an entirely separate and dissimilar case, the arguments advanced by the Solicitor General in his brief in the Lawyers Mortgage Company case are irrelevant as applied to the respondent herein.

However, we understand his assertion to be, in effect, that the great bulk of the gross income of the Lawyers Mortgage Company was derived by it from loans on and sales of mortgages, and not from its guaranty of the mortgages; and that it was therefore engaged principally in an investment business (Brief in Lawyers Mortgage Company case 23, 24, 31, 35). At any rate, the facts in the present case with respect to the respondent are to the contrary. The respondent received no lending fees and sold its mortgages for the face amount of the loans it had made on them. (R. 17-20.)

"The successful conduct of the business of credit insurance necessarily depends upon the insurer receiving correct information from the insured as to his losses." (*Black Co.* v. *London Guarantee & Accident Co.*, 216 N. Y. 560, 563.) The respondent has at all times refused to guarantee any mortgage with respect to which it did not have full knowledge and over which it did not have complete control. (R. 17.) It made the loans on mortgages in order to secure such knowledge and control, and thus enable it successfully to

conduct its mortgage guaranty business. Also, as we have seen, every mortgage guaranty policy issued by the respondent included its guaranty of the title to the property, for which it received the major part of the fees and charges. It is clear that the respondent's loans on and sales of mortgages constituted feeders for its title insurance business.

The unanimous Circuit Court of Appeals stated the situation in the present case as follows (R. 70; 50 F. (2d) 107, 110):

> "In the case of one who trades in mortgages, the profit in the transaction is expected to come from the spread in purchase and sale prices. This is not true of the plaintiff's business. Its primary purpose in acquiring and disposing of mortgages is not to invest its funds or to sell the mortgages at a profit, but is to dispose of them at their face value accompanied by its guaranty; and it is from the 'premium' for such guaranty, together with the fees previously collected from the mortgagor upon the making of the bond and mortgage, that plaintiff's profit is derived. Such fees cover charges for searching the title, and for inspecting and appraising the property, etc. The fees for title examination may be considered as the premium for the guaranty of title contained in the policy that is subsequently to be issued upon plaintiff's disposal of the bond and mortgage. This is none the less title insurance because the word 'guarantee' rather than 'insure' is used. See Title Ins. & Trust Co. *v.* City of Los Angeles, 61 Cal. App. 232, 214 P. 667. Nor does it matter that the insurance is paid for by one who is not the insured. The fees for inspections, appraisals, etc., may be considered as an incident to the insurance of the mortgage, for it is not an unreasonable incident to the business of guaranteeing mortgages that the insured should investigate and appraise the property it is to insure."

IV.

Substantially all of the respondent's income was subject to tax under Section 246 of the 1921 and 1924 Acts.

A. IF THE RESPONDENT'S RECEIPTS FROM THE GUARANTY OF MORTGAGES WERE INCLUDED AS INSURANCE, ALL OF ITS INCOME WAS SUBJECT TO TAX UNDER SECTION 246.

As already noted, the petitioner concedes (Brief, 10) that if the respondent had not received the premiums and fees for its guaranty of mortgages it would have been taxable under Section 246 (S. M. 5501, V-1 C. B. 102). The petitioner also apparently concedes that in that event all of the respondent's gross income would have been subject to tax under Section 246 (Brief in Lawyers Mortgage Company case, 12-22). To the extent that the respondent's gross income from its mortgage guaranties constituted receipts for the guaranteeing of titles it was concededly taxable under Section 246 (S. M. 5501, V-1 C. B. 102). That leaves the receipts from the guaranty of payment of the mortgages as the only item concerning which there appears to be any question.

B. EVEN IF THE RESPONDENT'S RECEIPTS FROM THE GUARANTY OF MORTGAGES WERE NOT FROM INSURANCE, SUBSTANTIALLY ALL OF ITS INCOME WOULD STILL BE SUBJECT TO TAX UNDER SECTION 246.

The three items that might conceivably be excluded on such a basis are (1), (2) and (5) shown in the table at page 16 above (R. 19). In order to illustrate the result of such exclusion with as little complication as possible, there are set out below comparative figures of gross income from the

guaranty of titles and the guaranty of mortgages in the case of one year, 1922:

	Guaranty of Titles	*Guaranty of Mortgages*
(At page 19 of the record)		
(1) Interest differential	.....	$105,750.03
(2) Fees and charges for inspections and appraisals	.....	139,830.45
(3) Fees and charges where no guaranty of mortgages	$406,019.93	.....
(4) Fees and charges, exclusive of those for inspections and appraisals, where guaranty of payment of mortgages	206,945.45	.....
(5) Mortgage renewals	.....	30,123.35
(6)-(9) Conveyancing fees, etc.	36,927.62	.....
(At page 15 of the record)		
(10) Interest on loans, etc.	102,330.66	.....
(11) Rents	863.91	.....
(12) Sales of securities	29.37	.....
Total	$753,116.94	$275,703.83
Grand Total		$1,028,820.77

For 1922 items (1), (2) and (5) amount to $275,703.83 as against a total gross income for that year of $1,028,820.77. But item (2) consists of appraisal and inspection fees, which the petitioner seems to have recognized as incidental to title insurance (see last two paragraphs of Sol. Mem. 5501, V-1 C. B. 102), and which would be restored to gross income on that ground. And item (1), the excess of interest received over that paid on guaranteed mortgages, would certainly be claimed by the Treasury Department to be subject to tax as interest. Barely possibly, if item (5), mortgage renewals, were excluded from insur-

ance income, it might be treated as in the nature of gain on dealings in securities, which Section 246 does not profess to tax.

In short, although, as correctly held by the Circuit Court of Appeals, Section 246 was never intended to subject to tax all possible income of an insurance company, and the existence in the case of any particular company of income not subject to tax thereunder is no evidence that such company is not an insurance company within the meaning of Section 246, nevertheless, substantially all the gross income of the respondent was subject to tax under Section 246, irrespective of whether or not its guaranty of the payment of mortgages be regarded as insurance.

V.

Section 246 of the 1921 and 1924 Acts is applicable to all insurance companies other than life or mutual insurance companies, whether or not all of their income is taxable thereunder.

A. THE STATUTES DO NOT DEFINE INSURANCE COMPANIES TAXABLE UNDER SECTION 246, BUT INCLUDE IN ITS APPLICATION EVERY INSURANCE COMPANY OTHER THAN A LIFE OR MUTUAL INSURANCE COMPANY.

Section 1000 of the Revenue Act of 1921 (to which Section 700 of the Revenue Act of 1924 is similar) provides that the capital stock tax imposed by such section shall not apply to any insurance company subject to the tax imposed by Section 243 or 246 of the Revenue Act of 1921 (to which Sections 243 and 246 of the Revenue Act of 1924 are similar),

Section 243, together with Sections 244 and 245, of the Revenue Acts of 1921 and 1924 provides for the income tax on life insurance companies, and Section 246, together with Section 247, of the Revenue Acts of 1921 and 1924 provides for the income tax on insurance companies other than life or mutual insurance companies.

The effect of the provisions of the Revenue Acts of 1921 and 1924, above referred to, is to impose the capital stock tax on mutual insurance companies except mutual life insurance companies, and to exclude from the application of the capital stock tax life insurance companies, whether stock or mutual, and other insurance companies except mutual insurance companies. Section 1000 of the Revenue Act of 1921 and Section 700 of the Revenue Act of 1924 could not have stopped with the phrase "any insurance company", because in that event all mutual insurance companies would have been free from the capital stock tax, contrary to the intention of Congress. Obviously, the addition in those sections of the phrase, "subject to the tax imposed by Section 243 or 246", was to limit the exclusion from the capital stock tax to those kinds of insurance companies subject to tax under Sections 243 and 246, namely, life insurance companies and other insurance companies except mutual insurance companies.

Section 242 defines a life insurance company, but there is no definition of other insurance companies.

Section 246 imposes a tax upon the net income of "every insurance company" other than a life or mutual insurance company. There is nothing in the statute indicating a purpose to confine its operation to any particular subjects of insurance. On the contrary, it was framed in general and comprehensive terms that cover insurance of every kind and character. The statute must, therefore, be construed

to include all insurance companies other than life and mutual insurance companies. *Cf. Lumber Mutual Fire Insurance Co.* v. *Malley,* 44 Fed. (2d) 553; *Northwestern Mutual Life Ins. Co.* v. *Roberts,* 177 Cal. 540, 171 Pac. 313, 314.

B. INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL INSURANCE COMPANIES ARE TAXABLE UNDER SECTION 246 EVEN THOUGH THEY RECEIVE INCOME NOT TAXABLE THEREUNDER.

The Solicitor General concedes that Section 246 "does not include many kinds of income which were to be included in the gross income" of insurance companies under the Revenue Act of 1918 and "other corporations" under the Revenue Acts of 1921 and 1924, but asserts that "apparently" there was no design to exempt any insurance company from taxation on any of its income, and that Section 246 therefore applies only to insurance companies all of whose income consists of premium income and investment income taxable thereunder. (Brief in Lawyers Mortgage Company case, 13-15.) Of course, the revenue acts do not so provide. To say that this assumption may be implied from Sections 246 and 247 is tantamount to saying that those sections impose a tax upon all of the income of insurance companies which come within their purview. This is clearly contrary to the intention of Congress and to the decided cases.

The Solicitor General concedes that insurance companies taxable under Section 246 were not required to include capital gains. The statute itself makes no distinction whatsoever between such gains and any other of the aforesaid "many kinds of income" which Section 246 concededly does not include, and the Solicitor General does not contend otherwise. "We understand", he says, "that the

reason why sales of capital assets were not to be included in computing the income tax was that there was a falling market at the time when this matter was considered and it was believed that insurance companies would take losses for tax purposes if sales of capital assets were included." (Brief in Lawyers Mortgage Company case, 15.)

The Solicitor General does not explain, however, why, if the market was falling, Congress did not also exempt corporations generally and individuals from taxation on capital gains in order to stop them from taking losses for tax purposes. Of course, if Congress desired to stop insurance companies or other taxpayers from taking capital losses it needed only to exclude such losses from the deductions allowed taxpayers. This it did not do. The exemption of income from taxation is scarcely equivalent to the denial of the deduction of losses.

No change was made in the law in regard to this matter until the Revenue Act of 1928 (Ch. 852, 45 Stat. 791) Section 204 (b) (1) (B) of which provides for the taxation of capital gains of insurance companies. Congress was apparently impelled to change the law in the 1928 Act by reason of its desire to eliminate the inequality which had existed between insurance companies under Section 246 and mutual insurance companies, which were always taxable on capital gains (*Alliance Ins. Co. of Philadelphia* v. *MacLaughlin*, 49 Fed. (2d) 361, 362).

(1) *The legislative history of these sections demonstrates conclusively that Congress selected the premium income and investment income as items of taxation solely for the purpose of providing a simple, certain and equitable method of computing the tax upon insurance companies, and that it intended that all other income be free from the tax.*

Ever since the Corporation Tax Act of August 5, 1909, the United States has laid a tax on insurance companies measured by net income. Prior to the Revenue Act of 1921, however, insurance companies were included in the statutory provisions imposing the income tax on corporations generally, and the gross and net incomes of insurance companies were, with stated exceptions, determined as in the case of other corporations. (See Sections 1, 230 (a), 232 and 233 (a), Revenue Act of 1918 (Ch. 18, 40 Stat. 1057); Section 1206, Revenue Act of 1917 (40 Stat. 300); Sections 10 and 12, Revenue Act of 1916 (Ch. 463, 39 Stat. 576); Section G, Revenue Act of 1913 (38 Stat. 114, 166); and Section 38, Revenue Act of 1909 (36 Stat. 112).)

Accordingly, before the 1921 Act, Congress sought to measure the tax upon insurance companies upon the same basis as other corporations, that is, by using the income derived by them from all sources. The regulations of the Treasury Department therefore provided that the gross income of insurance companies "consists of their total revenue from the operation of the business and of their income from all sources within the taxable year, except as otherwise provided by the statute". (Regulations 45, Article 548. See also Regulations 33 (Rev.), Paragraphs 673 and 674.) Because gross income was so defined, these regulations provided that there should be included in gross income, among other items, net premiums (that is, gross premiums less returned premiums on policies cancelled and premiums on policies not taken), investment income, profits from the sale of assets, and all gains, profits, and income reported to the State insurance departments, except income specifically exempt from tax.

In 1918 life insurance companies complained that the mixing of insurance with every other line of business in the revenue acts, and the attempt to tax them upon their income

from all sources, had resulted in chaos, and imposed upon them an uncertain and inequitable burden, and proposed that life insurance be given a separate classification and title and be taxed under a special simple provision, which would eliminate uncertainty, expensive bookkeeping and costly supervision. (See Hearings before the Committee on Ways and Means, House of Representatives, 65th Cong., 2d Sess., on the proposed Revenue Act of 1918, Pt. I, pp. 791-843.) The relevant part of a memorandum then submitted to the Ways and Means Committee on behalf of 111 life insurance companies is given in Appendix B to this brief, pages 52-58, *infra*. The Senate Finance Committee recommended in 1918 the plan later included in the Act of 1921 (Senate Report, 65th Cong., 3rd Sess., No. 617, p. 9). The plan was adopted by the Senate in the 1918 bill, but had to be abandoned in conference. (Conference Report, 65th Cong., 3rd Sess., Rep. No. 1037, p. 60).

At the annual meeting of Life Insurance Presidents, December, 1920, it was stated that the basis of the income tax was unsatisfactory both to the companies and the Government, and that a plan similar to that embodied in the Senate amendment to the 1918 bill should be adopted. (Proceedings of the Fourteenth Annual Meeting, pp. 140, 141, 143-145.) A statement on behalf of the Association of Life Insurance Presidents made to the Committee on Finance of the Senate, in its hearings on the proposed Revenue Act of 1921, a part of which is given in Appendix B to this brief, pages 58 and 59, *infra*, protested that the income tax imposed upon insurance companies by the prior revenue act was "unscientifically imposed", "unduly burdensome in many respects", and "unequal and unequitable as between companies", and, referring to the plan adopted by the Senate in 1918, said:

> "The law proposed then, to which we assented, would have increased our taxes, but it would have made them definite and certain from our standpoint and from the standpoint of the Government. It would have saved much of the litigation in which we have had to engage. There are now literally millions of dollars in litigation under the ambiguities and uncertainties of the present law, and the life companies are very anxious to be rid of that situation."

The Revenue Bill of 1921 (42 Stat. 227), as introduced in the House, contained the plan of taxation of life insurance companies which had been adopted by the Senate in 1918. (House Report, 67th Cong., 1st Sess., No. 350, p. 14.) The Revenue Bill of 1921 as passed by the House apparently for the first time made the new system of taxing life insurance companies also applicable to other kinds of insurance companies. The Senate, by amendment, made the scheme applicable only to life insurance companies, and by another amendment provided a different method of taxing other insurance companies, to which the House agreed in conference, as shown in Appendix B hereto. (House Report, 67th Cong., 1st Sess., No. 486, pp. 39-41.)

Mr. Smoot, Chairman of the Senate Finance Committee, reported said amendments. In the debate thereon in the Senate on October 29, 1921, when it was proposed to repeal the then existing tax on insurance premiums before enacting the new plan of taxing insurance companies, the following colloquy occurred (Cong. Record, 67th Congress, 1st Sess., Vol. 61, pp. 6982-6983):

> "Mr. Reed. I ask the Senator from Utah briefly to explain to the Senate the purpose of the amendment.
>
> Mr. Smoot. Under title 5 of the bill, the taxes on premiums on insurance companies are abolished en-

tirely. If this provision which we ask to have stricken out is agreed to, all insurance companies will be put on one basis and under one form of taxation, and that is the object of this amendment.

* * * * * *

Mr. Reed. Mr. President, I put the question to the Senator from Utah in all fairness, whether we ought to strike out the present substantive law until we know what is proposed to be substituted for it, and whether we should not adopt the new matter before we strike out the existing law? I would be entirely in the dark. I may be quite agreeable to all these changes; but I do not know what it is proposed to substitute.

Mr. Smoot. I want to say to the Senator, briefly, that the insurance companies of the United States have felt that the existing law is rather cumbersome and in some cases unfair. They are not asking for any decrease in the amount of tax to be collected. In fact, the plan which has been agreed upon will raise more revenue than the existing law; but it simplifies it, and all companies are treated alike. All the companies in the United States, as far as I know, have agreed to the new form of taxation."

It is accordingly clear that the difficulty which Congress was trying to remedy had nothing to do with any definition of insurance companies. The problem which confronted Congress was to devise a method of computing the income tax of insurance companies which would be simple, certain and equitable to them, and yet yield a fair revenue to the Government. And in Sections 246 and 247 it merely attempted to solve that problem.

In drafting these sections Congress was certainly aware that insurance companies might receive income from other sources than interest, dividends, rents and premiums; it

had taxed such other income in the preceding revenue acts. There was no controversy or litigation over the definition of insurance companies. There was merely the request that Congress select a simple and certain part of the income of insurance companies for taxation in order to eliminate the confusion, uncertainty and injustice of the preceding revenue acts. And that is all that Congress did.

(2) *The underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners, referred to in Section 246, does not define or restrict the income of insurance companies taxable under Sections 246 and 247.*

It should be observed that, while Section 246 refers to the form of annual statement approved by the National Convention of Insurance Commissioners, it proceeds to specify, regardless of such annual statement, just what shall be included in gross and net income. No special form of annual statement for title insurance companies was prepared or approved by the Insurance Commissioners until long after the taxable years in question. Title insurance companies, nevertheless, have always been held to constitute insurance companies within the provisions of Sections 246 and 247 and have always been taxed accordingly (Sol. Mem. 5501, V-1 C. B. 102; G. C. M. 5355, VII-2 C. B. 160).

In *Massachusetts Protective Ass'n, Inc.* v. *Commissioner*, 18 B. T. A. 810, the Board of Tax Appeals approved the inclusion by the Commissioner of Internal Revenue in the taxable income for 1922 of an accident and health insurance company, concededly taxable under Section 246 of the Revenue Act of 1921, of certain policy fees which were not included in the underwriting and investment exhibit of the

Insurance Commissioner's statement. The Board said in part:

> "The provision of the statute that the gross income be computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners does not intend to restrict gross income to the actual setup appearing in the statement, but rather contemplates the use of the statement as a guide and the acceptance of the figures and statements therein contained as correct, unless proven to be in error."

In *Western Casualty Co.* v. *Commissioner,* 20 B. T. A. 738, the Board of Tax Appeals approved the action of the Commissioner of Internal Revenue in denying a health and accident insurance company, concededly taxable under Sections 246 and 247 of the Revenue Act of 1926, which are substantially the same as Sections 246 and 247 of the Revenue Acts of 1921 and 1924, the right to deduct a certain reserve from its taxable income for 1926 because that item was not allowed as a deduction by Section 247, although it was shown as an expense on the annual statement approved by the National Convention of Insurance Commissioners.

Moreover, the National Convention has approved forms for "miscellaneous insurance companies," and title and mortgage guaranty companies could fall within this classification.

(3) *In the cases wherein the question has been raised, insurance companies have been held both taxable under Sections 246 and 247 and free from tax on some of their respective incomes.*

In *John Hancock Mutual Life Ins. Co.* v. *Commissioner of Internal Revenue,* 10 B. T. A. 736, capital gains were

held not to be taxable to a life insurance company because in the case of such a company "gross income" means the gross amount of income received from interest, dividends, and rents, and therefore nothing else.

In *Independent Life Insurance Co.* v. *Commissioner of Internal Revenue,* 17 B. T. A. 757, the Board of Tax Appeals held that under the Revenue Acts of 1921 and 1924 life insurance companies could not be taxed on premium receipts even indirectly. Referring to the Commissioner of Internal Revenue, the Board said:

> "*Respondent suggests, however, that since Congress has not measured the tax by using all of petitioner's income, such as premium receipts or sales profits, as it might have done,* petitioner could only complain by showing that the tax now determined for assessment is greater in amount than it would have been if Congress had used its power to the full extent. . . . By defining statutory gross income to include only interest, dividends, and rents, the intention was disclosed to omit all other factors from consideration. *National Life Insurance Co.* v. *United States, supra.* The effect otherwise would be to include premium receipts in gross income to the uncertain extent necessary to make up in each case for items improperly included, such as interest from State securities, or capital property like stock dividends, and thus to defeat the manifest legislative purpose to leave premium receipts entirely out of the income taxed. Thus to Congress would be ascribed the recondite purpose of ostensibly releasing premiums from tax while actually requiring them to be used to validate particular taxes which would otherwise invade constitutional rights. We reject this and treat the statute as candidly expressing its design and purpose." (Italics ours.)

Accordingly, it is clear that in the case of life insurance companies, taxable under Sections 244 and 245, the statutory definition of gross income concededly does not include, and was not intended to include, all of their regular or other income. This is equally true of insurance companies taxable under Section 246.

In *Massachusetts Protective Ass'n, Inc.* v. *Commissioner of Internal Revenue,* 18 B. T. A. 810, *supra,* it also appeared that the petitioner, an accident and health insurance company, concededly taxable under Section 246 of the Revenue Act of 1921, in 1922 received $125,000 in settlement of a suit brought by it against the National Protective Association and its officers to recover for the latter's alleged wrongful acts in competing with the petitioner. The Board held that such amount was not taxable and, referring to Section 246, said

> "The statute makes no provision for the inclusion in gross income of such an amount, and in determining the petitioner's taxable income we cannot go outside of the statute. *It was well within the rights of Congress to say what part of their gains the petitioner and other like insurance companies should be taxed upon, or from what sources their taxable income should be derived. It has said that only the earnings from investments and the earnings from premiums on insurance contracts should be taxed. We may presume that Congress was aware in drafting the law that a taxpayer, such as the petitioner, might receive income, in the general sense of the term, from other sources than those named.*" (Italics ours.)

The Treasury Department, unwarrantably narrow as its practice is, has never adopted the extreme position which

the Solicitor General finds it necessary to take in the present case. Not only has the Government consistently held that title guaranty corporations are taxable as insurance companies under Section 246, but it has expressly recognized that such classification is not voided for their receipt of incidental income from sources regarded as other than insurance. See Sol. Mem. 5501, V-1 C. B. 102; G. C. M. 5355, VII-2 C. B. 160.

The Solicitor General asserts (Brief in Lawyers Mortgage Company case 16-17) that the provisions of Section 246 allowing a division of premiums into earned and unearned premiums are not applicable to the premiums received by the Lawyers Mortgage Company for its guaranty of the payment of mortgages, and that Section 246 does not, therefore, apply to that Company. This argument, however, proves too much; for concededly, said provisions of Section 246 are not adapted to companies engaged solely in insuring titles (I. T. 1981, III-1 C. B. 311), which would therefore be excluded, although such companies are admittedly taxable under Section 246 (Sol. Mem. 5501, V-1 C. B. 102; G. C. M. 5355, VII-2 C. B. 160).

The Solicitor General also asserts (Brief in Lawyers Mortgage Company case 18-20) that affirmance of the decision below in the Lawyers Mortgage Company case would permit many companies to escape taxation on a substantial part of their income. However that may be in that case, it certainly is not true in the present case (pp. 22-24, *supra*). As we have seen (pp. 14-19, *supra*), most of the respondent's income was derived from its guaranty of titles. Because the respondent's guaranteeing of the payment of mortgages constitutes insurance, the income therefrom is also taxable. Moreover, even if any of the incidental income of the respondent would escape taxation, it does not follow,

for the reasons hereinbefore stated, that the respondent is not an insurance company under Section 246.

The sole question involved in *Mortgage Guarantee Co. v. Welch*, 38 Fed (2d) 184, was whether certain mortgage participation certificates constituted "corporate securities" and were, therefore, subject to the stamp tax imposed by Section 800 of the Revenue Act of 1926, 44 Stat. 99, and Section 422 (a) of the Revenue Act of 1928, 44 Stat. 867. The court held that said certificates constituted corporate securities and were, therefore, subject to the stamp tax. The question whether said certificates constituted contracts of insurance was not an issue in the case, was not considered, and could have no bearing on the case. The representation by the Solicitor General (Brief in Lawyers Mortgage Company case 20) that the decision in the present case "may well have an important bearing" on cases involving said stamp tax, is, therefore, wide of the mark.

VI.

The respondent's guaranty of the payment of mortgages constitutes insurance.

In support of his contention to the contrary the Solicitor General merely refers to his brief for the petitioner in the entirely separate and dissimilar Lawyers Mortgage Company case. The Circuit Court of Appeals unanimously held that the respondent's business of guaranteeing the payment of mortgages was truly insurance. (R. 69.)

The Solicitor General's assertions are, as we understand them, that the guaranty of payment of the mortgages by the Lawyers Mortgage Company was but an incident to its making of the loans on and sales of the mortgages, from

which it derived much of its income; that the Company received no compensation for its guaranty of payment; and that the holders of the mortgage guaranty policies were merely investors who bought only the obligation of the Lawyers Mortgage Company, and were not, therefore, insured against any risk. (Brief in Lawyers Mortgage Company case 22-35.)

In the present case, as we have seen, the respondent derived no income from its loans on and sales of mortgages, which were merely incidental to its guaranty business; and the premiums paid to the respondent constituted compensation for its guaranty of the payment of the mortgages. (R. 18.)

A. THE RESPONDENT GUARANTEES THE PAYMENT OF THE DEBTS OF MORTGAGORS AND BEARS THE RISK OF NONCOLLECTION FROM THEM, FOR WHICH IT RECEIVES A PREMIUM.

The non-payment of a bond or the non-performance of any of the provisions of a mortgage without question is a breach of a contract or undertaking the performance of which can be guaranteed; and in such a case the guarantor takes upon himself certain risks to which the obligee or creditor would otherwise be exposed. (*People* v. *Potts*, 264 Ill. 522, 106 N. E. 524; *Hunt* v. *New Hampshire Fire Underwriters Ass'n.*, 68 N. H. 305, 38 Atl. 145, 147.) We agree with the Solicitor General that the respondent's obligation on its guaranty of payment of mortgages is closely analogous to the obligation of a factor under a *del credere* commission.

In both cases the relation between the guarantor and the creditor is that of principal and agent; the respondent is appointed agent to collect the interest and principal of the bond and mortgage (R. 51-54); and the factor is appointed agent to sell the merchandise and perform such

other services as the given contract may provide. Even if the respondent's agency is irrevocable, the relationship between it and the policyholder is none the less that of principal and agent (*Barney* v. *Bond & Mortgage Guarantee Co.*, 118 Misc. (N. Y.) 241, 193 N. Y. Supp. 19). As agents, both the respondent and the factor engage only for reasonable skill and ordinary diligence, and are liable only for injuries to their respective principals growing out of want of that skill and diligence (*Loeb* v. *Hellman*, 83 N. Y. 601, 602-603); but are liable as fiduciaries, and not as debtors, for the proceeds of the mortgages and sales, respectively, collected by them (*Wallace* v. *Castle*, 14 Hun 106; *Gindre* v. *Kean*, 7 Misc. 582, 28 N. Y. Supp. 4, 5).

Again, both the respondent and the factor under a *del credere* commission, in consideration of an additional compensation, absolutely engage to pay to their respective principals the amount of the mortgage and the price of the goods sold, respectively, when the term of credit has expired, thus relieving the principal of all risk of loss in case the debtors fail to pay. Although this guaranty of payment enlarges the duty of the respondent and the factor beyond that required of them by law as agents, it does not otherwise alter the agency, and they still remain liable as fiduciaries, and not as debtors, for the amounts collected by them. Notwithstanding said guaranty of payment, the mortgagor and purchaser, respectively, continue to be primary debtors (*Miller* v. *Reinhart*, 119 N. Y. 368, 378-379), and the principals are not confined to suit on the guaranty, but can also pursue their remedies against said debtors while the moneys are unpaid by them, and against the respondent and factor, respectively, for the moneys paid to them. (*Gindre* v. *Kean*, 7 Misc. 582, 28 N. Y. Supp. 4, 5; *Gans* v. *McGowan*, 41 App. Div. 461; *Loos* v. *McCor-*

mack, 107 App. Div. 8, 10; *State* v. *McAvoy*, 40 R. I. 437, 450-452, 101 Atl. 109.)

Accordingly, as the Circuit Court of Appeals held, the respondent bears the risk of non-collection from the mortgagors.

B. THE RESPONDENT'S GUARANTY OF PAYMENT CONSTITUTES A CONTRACT OF SURETYSHIP.

Technical differences found by some courts between contracts of "guaranty", "suretyship" and "indemnity" obviously are not decisive on the question here under consideration as to whether the respondent's business of bearing said risks constitutes insurance. The nature of the obligation, and not the use of such terms as "guaranty", "suretyship" or "indemnity", determines the legal effect of the contract. (*Dayton Rubber Mfg. Co. of Delaware* v. *Sabra* (C. C. A.), 31 Fed. (2d) 9; *Pan-American Bank & Trust Co.* v. *National City Bank*, 6 Fed. (2d) 762, certiorari denied 269 U. S. 554.) In *Allin* v. *Motorist's Alliance of America*, 234 Ky. 714, 29 S. W. (2d) 19, a contract was held to be one of insurance even though it expressly stated, on its face, that it was not an insurance policy. Although the question under consideration is one of general law, yet, under well-settled principles, it should, if possible, be decided in harmony with the decisions of the New York courts. (*B. F. Sturtevant Co.* v. *Fidelity & Deposit Co. of Maryland*, 285 Fed. 367; *Ramsey & Gatlin Construction Co., et al.* v. *Vincennes Bridge Co.*, 283 U. S. 796; *Community Bldg. Co.* v. *Maryland Casualty Co.* (C. C. A.), 8 Fed. (2d) 678.)

The confusion of the Solicitor General is in part based upon his erroneous notion that a guaranty is in some way

different from a contract of suretyship. Such a notion was unknown to the common law and is unknown to the English courts. It is found only in some American cases and arose in the Pennsylvania case of *Gibbs* v. *Cannon* (1823), 9 Searg. & Rawle (Pa.) 198, 201, and the Massachusetts case of *Oxford Bank* v. *Haynes* (1825), 25 Mass. (8 Pick.) 423, 428, where the courts were not, in fact, interpreting the word "guaranty". See the learned and exhaustive article on Guaranty and Suretyship by Max Radin in 17 California Law Review 605-662, concluded in 18 California Law Review 21-30. As Mr. Radin aptly concludes (18 *id.* 30):

> "It is in the highest degree unfortunate that the decision of any case should be allowed to turn upon the whimsy of a Pennsylvania or Massachusetts judge of nearly a century ago. It has no roots in the past. It has no sense in the present. If it is disregarded—as it is in many jurisdictions—it will clear the subject of a portentous amount of confused phrases and economize effort in investigating, besides avoiding the obvious injustice of refusing or granting relief on so insubstantial a basis."

In New York and the courts of the United States, as in England, the alleged distinction never gained a footing. *Cumpston* v. *McNair* (1828), 1 Wend. (N. Y.) 457; *Davis* v. *Wells* (1881), 104 U. S. 159 (where the court states that the "contract of guaranty is the obligation of a surety").

The liability of a surety is original, primary and direct, and a contract imposing such liability is one of suretyship. (*Transcontinental Petroleum Co.* v. *Interocean Oil Co.*, 262 Fed. 278, 283; *Peterson* v. *Miller Rubber Co. of New York* (C. C. A.), 24 Fed. (2d) 59, 61.) Where, because of the nature of the obligation, a guaranty constitutes such a lia-

bility, the contract is one of suretyship, without regard to whether it is called one of guaranty or suretyship. (*Dayton Rubber Mfg. Co. of Delaware* v. *Sabra* (C. C. A.), 31 Fed. (2d) 9.)

In New York and the courts of the United States the respondent's guaranty of payment constitutes an absolute, original, primary and direct promise by it to pay the bonds, both principal and interest, at the times the payments are promised in the bonds, and is a contract of suretyship. *Wayne Oil Tank & Pump Co.* v. *Stoltz,* 163 N. Y. Supp. 601; *First Nat. Bank* v. *Jones,* 219 N. Y. 312; *Loos* v. *McCormack,* 107 App. Div. 8, 93 N. Y. Supp. 1088; *In re Adair Realty & Trust Co.,* 35 Fed. (2d) 531.

C. BECAUSE THE RESPONDENT IS A CORPORATE SURETY FOR PROFIT WITH RESPECT TO ITS GUARANTIES OF PAYMENT, SUCH GUARANTIES CONSTITUTE INSURANCE.

The respondent's guaranty of payment is for a profit, which is a part of its business. That business is the same as credit and fidelity insurance as practiced by corporate sureties for profit, and is truly insurance. As the Circuit Court of Appeals said in the present case (R. 69, 50 Fed. (2d) 110):

> "There is no hard and fast line between contracts of insurance and contracts of guaranty. Frost, Law of Guaranty Insurance (2d Ed.) 16; Hunt *v.* New Hampshire Fire Underwriters' Ass'n, 68 N. H. 305, 308, 38 A. 145, 38 L. R. A. 514, 73 Am. St. Rep. 602. Insurance differs from guaranty only as the business of insurance differs from a single contract of guaranty, suretyship, or indemnity. The business of insurance consists in accepting a number of risks, some of which will involve losses, and of spreading such losses over all the risks so as to enable the insurer

to accept each risk at a slight fraction of the possible liability upon it. As this court said in Tebbets *v.* Mercantile Credit Guarantee Co., 73 F. 95, at page 97, in respect to credit insurance: 'Corporations entering into contracts like the one at bar may call themselves "guarantee" or "surety" companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such.'"

The following cases are in accord:

Young v. *American Bonding Co.*, 228 Pa. 373, 77 Atl. 623; *State* v. *Chicago Bonding & Surety Co.*, 279 Mo. 535, 215 S. W. 20, 25; *People* v. *Rose*, 174 Ill. 310, 51 N. E. 246; *Town of Whitestown* v. *Title Guaranty & Sur. Co.*, 72 Misc. Rep. 498, 131 N. Y. Supp. 390, 393 (aff. 148 App. Div. 900, which was aff. 209 N. Y. 12); *Tidewater Coal Exchange, Inc.*, v. *New Amsterdam Casualty Co.*, 20 Fed. (2d) 951; *People* v. *Potts*, 264 Ill. 522, 106 N. E. 524.

The cases involving factors under *del credere* commissions cited by the Solicitor General (Brief in Lawyers Mortgage Company case 31), presented no occasion for deciding whether the factors' guaranty of payment constituted insurance. We know of no *del credere* cases where there was need for such a decision, and the Solicitor General cites no such cases. The cases cited on pages 64 to 67 of the petitioner's brief in the Lawyers Mortgage Company case are clearly distinguishable and do not apply to the situation in the present case.

D. THE RESPONDENT'S GUARANTY OF PAYMENT IS A CONTRACT OF INDEMNITY IN THE SENSE IN WHICH INDEMNITY IS ESSENTIAL TO A CONTRACT OF INSURANCE.

The point as to indemnity which the Solicitor General makes (Brief in Lawyers Mortgage Company case 28-30) has been fully answered by the Circuit Court of Appeals in the present case, as follows (R. 68-69):

> "The argument runs that a guaranty, i. e., the promise to pay the debt of another, can not be insurance, because it is not a contract of indemnity. Speaking generally, it may be said that a contract of insurance is a contract of indemnity, and many authorities might be cited containing statements to this effect. See United States *v.* Supplee-Biddle Hardware Co., 265 U. S. 189, 195, 44 S. Ct. 546, 68 L. Ed. 970; Claflin *v.* U. S. Credit System Co., 165 Mass. 501, 502, 43 N. E. 293, 52 Am. St. Rep. 528; Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19, 31, 54 Am. Dec. 309. The statement is true if it means that the insured must have some interest at risk, for otherwise the contract is a wager; but it is not true if construed to mean that the insured can never collect from the insurer more than his actual loss (Empire Development Co. *v.* Title Guarantee & Trust Co., 225 N. Y. 53, 58, 121 N. E. 468), or that the insured must first salvage what he can and then look to the insurer only for the difference. As is well known, it is the common practice of fire and marine insurers to pay in full and take over the physical remnants of the insured property in the event of injury sufficient to constitute a 'total loss.' They do not indemnify the insured in the sense required by the defendant's argument; rather they pay upon the happening of the condition specified in the policy, and themselves work out the salvage. Similarly, a policy of credit insurance would surely be no less insurance because the contract provided that upon

the debtor's default the insurer would pay in full and take over the claim for collection. See Dane *v.* Mortgage Ins. Co. 1894), 1 Q. B. 54; Shaw *v.* Royce (1911), 1 Ch. 138. This is in substance what the plaintiff agrees to do in its policies of mortgage guaranty. If the mortgagor pays, the plaintiff will remit as soon as collected, reserving its 'premium' from the interest, but in any event it will pay on the date specified in its 'policy.' It bears the risk of noncollection from the mortgagor."

E. CONGRESS HAS ITSELF CLASSIFIED THE GUARANTY OF MORTGAGES AS INSURANCE, AND HAS TAXED MORTGAGE GUARANTY POLICIES AS INSURANCE POLICIES.

Title V of the Revenue Act of 1918 (Ch. 18, 40 Stat. 1057) imposed certain taxes on "insurance". Section 503 of that title imposed a tax "on the issuance of insurance policies", including

> "(c) Casualty insurance: A tax equivalent to 1 cent on each dollar or fractional part thereof of the premium charged under each policy of insurance or obligation of the nature of indemnity for loss, damage, or liability (except bonds and policies taxable under subdivision 2 of schedule A of Title XI) * * * "

Schedule A of Title XI of the Revenue Act of 1918 imposed stamp taxes on various items, including

> "2. Bonds, indemnity and surety: On all bonds executed for indemnifying any person who shall have become bound or engaged as surety, and on all bonds executed for the due execution or performance of any contract, obligation, or requirement, or the duties of any office or position, and to account for money received by virtue thereof, and on all policies of guaranty and fidelity insurance, including policies guaranteeing titles to real estate and mortgage guarantee policies, * * * 50 cents: *Provided,* That

where a premium is charged for the issuance, execution, renewal or continuance of such bond the tax shall be 1 cent on each dollar or fractional part thereof of the premium charged: * * *"

Accordingly, Congress classified the bonds and policies taxable under subdivision 2 of schedule A of Title XI as "insurance"; it regarded policies guaranteeing titles to real estate and mortgage guarantee policies as of the same character; and it classified and taxed them as "policies of insurance" under said subdivision 2.

CONCLUSION.

For the reasons above set forth the respondent, as an insurance company, is not subject to the capital stock taxes imposed by the Revenue Acts of 1921 and 1924. It is an insurance company under the laws of the State of its incorporation; its business is regulated as insurance; it derives most of its income from title insurance; substantially all of its income is subject to tax under Section 246, which is applicable to all insurance companies, whether or not all of their income is taxable thereunder; and, finally, the guaranty of mortgages, a phase of the respondent's business subsidiary to title insurance, also constitutes insurance. The judgment of the Circuit Court of Appeals should accordingly be affirmed.

January 14, 1932.

Respectfully submitted,

SATTERLEE & SPENCE,
Attorneys for the respondent.

HUGH SATTERLEE,
I. HERMAN SHER,
Of counsel.

Appendix A.

Insurance Law of New York.

The statutory provisions which were in force and under which the respondent was organized on February 8, 1906, were in part as follows:

THE INSURANCE LAW (Being Chapter 38 of the General Laws).

ARTICLE V.

Title and Credit Guaranty Corporations.

Incorporation of title and credit guaranty corporations. Five or more persons may form a corporation for either one or the other of the following purposes:

1. To examine titles to real property and chattels real, to procure and furnish information in relation thereto, make and guarantee the correctness of searches for all instruments, liens or charges affecting the same, guarantee or insure the payment of bonds and mortgages and guarantee and insure the owners of real property and chattels real and others interested therein against the loss by reason of defective titles thereto and other incumbrances thereon which shall be known as a title guarantee corporation; * * * (L. 1892, ch. 690, §170, as am'd L. 1900, ch. 266; L. 1901, ch. 677, and L. 1904, ch. 543; vol. 4, p. 432, of Supp. to Birdsey's R. S., 3d ed.)

Investment of capital and funds of a title guaranty corporation. The capital and funds accumulated in the course of its business of every such title guaranty corporation shall be invested in the same kind of securities as the capital and stock of insurance corporations are required by this chapter to be invested. Every such corporation shall set apart a sum not less than two-thirds of the amount of its capital stock as a guaranty fund, and shall invest the same in the kinds of securities in which it is permitted to invest

its capital. No such corporation shall issue any guaranty or policy of insurance upon bonds and mortgages or to owners of real property and others interested therein against loss by reason of defective titles and other incumbrances, until such sum has been so set apart and invested. Such fund shall be kept and applied for the security and payment of losses and expenses which may be incurred by reason of the guaranty or insurance made as aforesaid, and shall not be subject to other liabilities of the corporation to the extent of and so long as any such guaranty or insurance is outstanding. If an increase of its capital stock is made by any such corporation, two-thirds of such increase shall be set apart and added to the guaranty fund thereof and kept and invested as above provided. When, on account of losses or otherwise, the amount of the guaranty fund of any such corporation shall fall below such sum as was required to be set apart and invested by this section, no further guaranty or insurance shall be issued until the deficiency below the amount so required has been supplied. Every corporation organized under the provisions of subdivision one of section one hundred and seventy of the insurance law shall make and file with the superintendent of insurance on or before the thirty-first day of January of each year, a report in writing, setting forth the aggregate amount of the bonds and mortgages outstanding on the thirty-first day of the preceding December the payment of the principal and interest of which has been guaranteed by such corporation. (L. 1892, ch. 690, §176, as am'd L. 1904, ch. 543; vol. 4, p. 433, of Supp. to Birdsey's R. S., 3d ed.)

ARTICLE I.

General Provisions.

Short title. This chapter shall be known as the insurance law, and shall be applicable to all corporations authorized by law to make insurances. (L. 1892, ch. 690, §1; Birdsey's R. S., 3d ed., p. 1819.)

The superintendent of insurance. There shall continue to be a separate and distinct department charged with the execution of the laws relating to insurance, to be known as the insurance department, the chief officer of which shall be the superintendent of insurance. * * * (*Id.*, §2.)

Certificate of attorney-general; corporate names; number of directors. When application is made to the superintendent of insurance by any person desiring to become incorporated as an insurance corporation, or for authority to transact the business of insurance in this state, under or pursuant to any declaration and charter presented for filing in the insurance department, or any amended declaration or charter required by law to be filed, or to be approved by the superintendent, the superintendent shall not file such declaration and charter or grant such certificate of authority until such declaration and charter shall have been examined by the attorney-general, and certified by him to the superintendent to be in accordance with the requirements of law. * * * (L. 1892, ch. 690, §10, as am'd L. 1893, ch. 725; L. 1898, ch. 171, and L. 1900, ch. 366; Birdsey's R. S., 3d ed., pp. 1821-1822.)

Examination by superintendent. If the declaration and charter specified in the preceding sections shall be approved by the attorney-general, the superintendent shall thereupon cause an examination to be made by himself, or by one or more competent and disinterested persons specially appointed by him for that purpose, into the affairs of the corporation or proposed corporation, except in the case of corporations proposing to incorporate under article six of this chapter.

If such persons, after examination made, shall certify under oath, if it be a stock corporation, that the amount of capital required by law has been paid in and is possessed by it in cash, or is invested in the manner required by law; * * * the superintendent shall file such certificate in his department. Every such insurance corporation shall also deposit with the superintendent of insurance, before receiv-

ing authority to transact business in this state, such sums of money or securities as may be required by law. (*Id.*, Sec. 11, as am'd. L. 1893, ch. 725; Birdsey's R. S., 3d ed., p. 1822.)

When corporation to be deemed insolvent. Every insurance corporation specified in articles two, three, four and five of this chapter, whose assets and credits are not sufficient to reinsure its outstanding risks in a solvent insurance corporation, shall be deemed insolvent and may be proceeded against as an insolvent corporation. (*Id.*, Sec. 21.)

Limitation of risk. No domestic insurance corporation, * * * shall expose itself to any loss on any one risk or hazard to an amount exceeding ten per cent. of its capital and surplus. * * * (*Id.*, Sec. 24.)

Examiners and examinations. The superintendent of insurance shall, as often as he deems it expedient, appoint one or more competent persons not officers of or connected with, or interested in any insurance corporation doing business in this state, other than a policyholder, as examiners to examine into the affairs of any such corporation. Such examiners may examine under oath the officers and agents of any such corporation and its books, with reference to its business. Every such corporation, its officers and agents, shall produce its books and all papers in its or their possession relating to its business or affairs for the inspection and examination of such examiners whenever required; and shall facilitate such examination and aid the examiners in making the same so far as it is in their power to do so. * * * (L. 1892, ch. 690, Sec. 39; Birdsey's R. S., 3d ed., pp. 1833-1834.)

Reports of corporations. Every corporation engaged wholly or in part in the transaction of the business of insurance in this state, whether heretofore or hereafter incorporated by a general or special law, except corporations

formed under articles, sixth, seventh, eighth and ninth of this chapter, shall annually, on the first day of January, or within two months thereafter, if a corporation under article two of this chapter, and within one month thereafter, if a corporation under articles three and four of this chapter, file in the office of the superintendent of insurance a statement verified by the oath of at least two of the principal officers of such corporation, showing its condition on the thirty-first day of December then next preceding, which shall be in such form and shall contain such matters as the superintendent shall prescribe. * * * (*Id.*, Sec. 44, as am'd. L. 1897, ch. 493; Birdsey's R. S., 3d ed., p. 1836.)

Appendix B.

Legislative history of Sections 243 and 246 of the Revenue Acts of 1921 and 1924.

1. In a memorandum filed with the Committee on Ways and Means of the House of Representatives on behalf of the American Life Convention, representing 111 legal reserve life insurance companies, when the Revenue Bill of 1918 (40 Stat. 1057) was being considered, it was said (Hearings before the Committee on Ways and Means of the House, 65th Cong., 2d Sess., Pt. I, pp. 840-843):

> "SUGGESTIONS OF TAXATION OF LIFE INSURANCE COMPANIES PRESENTED TO THE WAYS AND MEANS COMMITTEE BY HARRY L. SEAY, PRESIDENT OF THE AMERICAN LIFE CONVENTION.
>
> From figures furnished by the Spectator and the American Underwriter we have gathered the following statistics on 227 legal reserve life insurance companies in the United States on December 31, 1917—227 being practically all the companies doing business in the United States:
>
> | | |
> |---|---|
> | Whole amount insurance in force | $27,973,057,673 |
> | Total premium income | 965,545,988 |
> | New ordinary business written in 1917 | 3,981,347,386 |
>
> Life insurance companies are subject to the following Federal taxes:
>
> 1. As corporations, upon net income (sec. 10, title 1, act of Sept. 8, 1916, and sec. 130, present act). The sum received from this source will approximate $1,500,000.
>
> 2. A capital tax of 50 cents per $1,000 of fair value of capital and surplus and undivided profits, excluding reserves and in excess of $99,000. The sum received from this source will approximate $200,000.

3. The so-called excess profits tax (sec. 200, act of Mar. 3, 1917). As there can only be war losses and no excess profits for insurance companies during the war, and as this section will have to be construed by the courts before companies can know their status thereunder, nothing has been received from this source.

4. A tax of 8 cents on each $100 and fraction thereof of amount for which any life is insured after the passage of the present act. The sum received from this source will approximate $3,200,000.

5. Tax of 10 per cent upon any surplus not distributed within 6 months. Impossible to ascertain what this will bring, but it will be very small.

The total amount received from life insurance companies per annum under existing laws will approximate $4,900,000.

Life insurance companies also have to bear the burden of added expenses produced by—

1. War stamp taxes.

2. Increase of postal rates.

The amount received from the last two items is large, but as the burden falls alike upon all, we offer no suggestions as to them.

From the above you will see that life-insurance companies are mixed in with practically every other line of business; the provisions affecting them are multifarious and confusing, and none of the companies now know whether the returns filed are correct or not. Under existing laws it takes actuaries, accountants, and lawyers to prepare returns, and then no two sets can agree as to what those returns should show. While it is difficult for the companies to make returns, it is still more difficult for the Government to check them, because it requires examiners of more technical and expert knowledge than is usually employed in that class of work. They must be not only expert accountants, but actuaries and lawyers as well. Courts, Commissioners of Internal Revenue, and companies have differed in the interpretation of the law, and the Government and companies can not know what the taxes will be until

courts of last resort have passed on the acts. This is a condition all of us would like to avoid, for litigation is slow, uncertain, and expensive. We believe it would be better for the Government and the companies if the law be so drafted as to clear away every vestige of doubt and confusion and apprise the companies of what they should pay and the Government of what it will receive.

This can be done by the application of a premium income tax. This method is so simple a child can calculate it and an ordinary clerk can check it. The tax should be paid monthly by the companies on the premiums received for the month, and thus the finances of the country would be to some extent relieved of the burden that now falls on them on account of the taxes having to be paid at one time. It is easy to ascertain what the premium income of the companies is. Then determine what amount insurance companies should pay and apply a percentage of that income that will produce the amount desired.

For instance, we know that insurance companies paid approximately $4,900,000 in 1917. If you wish to tax them the same under this new revenue bill, a tax of one-half of 1 per cent. on a premium income of $965,545,988 will give you $4,827,725, or practically the same as raised under the old act. The premium income for 1917 was $90,257,381 more than for 1916, and for 1918 it ought to be $90,000,000 more than for 1917. So the tax for 1918 on a basis of one-half of 1 per cent. of the premium income ought to be close to $5,250,000.

On an estimated premium income for 1918 of $1,000,000,000 a tax of—

One-half of 1 per cent. will produce	$ 5,000,000
Three-fourths of 1 per cent. will produce	7,500,000
1 per cent. will produce	10,000,000

If it is true that the best method of taxation is the simplest, then we have but to compare the uncertainty and confusion surrounding the present plan with the simplicity of the plan proposed in order to determine which to adopt.

Aside from being simple and easy, a premium income tax would be equitable to all. There is no reason for taxing first-year business 8 cents on each $100. That is the most unjust of all taxes and falls heaviest on the companies. The first year's business has to pay the agents' commissions, which will average about 55 per cent.,' the medical examination of $5, and the inspection report of from one or two dollars, and when you add to these the burden of 8 cents on each $100 you force every company to lose on first-year business, even without charging to it any overhead expense. Furthermore, it is not fair to the younger companies, because it compels them to pay a tax on a larger percentage of their business than is required of the older companies. I have in mind a western company with a little over $20,000,000 of business in force which wrote in 1917 $7,072,137, on which it paid the 8 cents tax, or a tax on one-third of its business. One of the older companies, with $1,773,411,526 of insurance in force, wrote for 1917 $209,054,920, on which it paid the 8 cents tax, or a tax on one-eighth of its business. Another inequality is manifest when you consider that the companies writing one particular class of business will have to pay more than other companies. There are companies writing term insurance almost exclusively. This term insurance runs for 5 or 10 years and carries a very low premium—an average, say, of $12 per thousand. That company would be hit a great deal harder in paying 8 cents per hundred, or 7 per cent. of the premium, than the company writing almost exclusively endowment business, the premium on which is larger and runs longer. If the endowment premium is $40 per thousand, which will probably be the average, it is taxed only 2 per cent.

Our proposal is that insurance, and especially life insurance, be given a separate classification and title and be taxed under a special provision which shall eliminate expensive bookkeeping and costly supervision and produce a greater revenue.

We of the South and West and the Younger companies of the East, for whom I speak, are willing to pay taxes. We do not subscribe to the doctrine long urged by publicists that the taxing hand of the Government should not be laid upon the handmaid of

thrift in time of war. We believe life insurance companies, associations, and societies of every name and character should contribute their share and should not be exempt.

But we wish the tax to be equitable, plain and enforceable. We have no net income, no excess or war profits, and no inheritance items in the sense that these are used in the revenue acts and no language of law will convey into the Treasury the sums we should pay under proper construction of the terms of the law under which these items for taxation are defined. No two companies would ordinarily make up financial tables upon exactly the same basis. They have different formulas for valuation; they make up contracts upon differing bases; they are not in any sense uniform as to the features of their contracts. There are distinctions of very great importance in the matter of actuarial calculations between full reserve and other methods of calculating values, present and future, between participating and non-participating forms of policies, and in bookkeeping systems of reckoning the elements entering into the transactions of their business.

While all forms of life insurance, whether fraternal, assessment, participating legal reserve or non-participating legal reserve are based upon the same fundamentals, there is a very marked difference in the manner of calculating liability and consequently of determining assets, surplus, and income. No two companies pay exactly the same so-called dividends and there are vast variations in the manner and times as well as amounts of these dividends. There are distinctions in the condition of cash surrenders, extended insurance, paid-up values, and other incidents of the policy contract. In legal reserve life insurance there is a mathematical certainty in every feature of the policy from premiums to paid-up values and from applicant to beneficiary, but these mathematical calculations and combinations mean nothing to ordinary commercial bookkeeping and accountants.

Hence the phraseology of each of the several bills which require payment of tax by 'every person, corporation, association, and insurance company' has proved inadequate and require a court construction

which in most cases resulted unfavorably to the interpretation of the Treasury Department.

In the opinion of experts, no act can be drawn upon income tax or excess profits principles which will be logically applicable to legal reserve life insurance. This form of commercial fiduciary endeavor should pay taxes for the use of the Federal Government in this emergency and should contribute generously to the common defense fund.

This can be accmplished without difficulty by treating all forms of insurance and indemnity under a separate title and making special provisions for assessing and paying such tax.

Under the present act there are seven provisions affecting life insurance, five of which, as already stated, are inequitable and difficult to apply to our business.

If the Government shall eliminate all reference to insurance companies in the act and make a special chapter for insurance the amount of tax can readily be determined, easily collected, and made mathematically certain in a single paragraph reading about as follows:

* * * * * *

This will bring to the Government monthly a proportionate amount of the annual tax. There will be no difficulty whatever in checking the returns and the opportunity of avoiding payment of taxes is entirely removed.

This should be an emergency tax. It ought to be so understood and should be reduced after the war from time to time. Finally it should be repealed and the several forms of insurance should be relieved entirely from any Federal tax, since insurance is not a Federal function and the States unmercifully tax the business.

Our appearance here today is in response to requests by members of your committee made at a previous hearing on the 12th day of June, 1918. Mr. T. W. Blackburn, secretary of the American Life Convention, was asked to offer some plan that would be more equitable and less confusing. As president of the American Life Convention, I immediately called a meeting of the executive committee of the conven-

tion, which was held in St. Louis, Mo., on June 22, 1918. After going deeply into the question of taxation, the committee, with every member present, unanimously recommended that the premium income be taxed in lieu of all other Federal taxation."

2. In a statement submitted to the Committee on Finance of the Senate, in its Hearings on the proposed Revenue Act of 1921, Robert Lynn Cox, representing the Metropolitan Life Insurance Co. of New York, and appearing as a member of a committee of the Association of Life Insurance Presidents, said (Hearings before the Committee on Finance of the Senate on the proposed Revenue Act of 1921, 67th Cong., 1st Sess., p. 594):

"We wish to present for your consideration a few points on behalf of the life insurance companies.

The tax question, viewed from our standpoint, groups itself, I think, into three general classifications, so far as this hearing is concerned. First, taxes payable by the companies as corporations; second, taxes payable by beneficiaries under life insurance policies; third, taxes payable by life insurance policyholders direct. In the first place, there are the taxes that are imposed upon the companies and are paid by the companies; taxes in various forms. It is not my purpose to discuss that question here today. We think they are unscientifically imposed; that they are unduly burdensome in many respects; that they are unequal and unequitable as between companies. But this particular subject was taken up at the Treasury Department two years ago, and the Senate had before it suggestions coming from the Treasury Department; in fact, adopted them in the Senate, and we are assuming here today that what you considered then will come before you in ordinary course for consideration again.

We were not then asking for a reduction in taxes or an exemption from taxation, and we are not now. The law proposed then, to which we assented, would have increased our taxes, but it would have made them definite and certain from our standpoint and from the standpoint of the Government. It would

have saved much of the litigation in which we have had to engage. There are now literally millions of dollars in litigation under the ambiguities and uncertainties of the present law, and the life companies are very anxious to be rid of that situation.

With that much said about the taxes that are imposed upon us, I would like to consider two or three other points with you.* * *"

3. The Committee on Finance, in its report on the proposed Revenue Act of 1921, said (67th Cong., 1st Sess., Senate Report No. 275, p. 20):

"Sections 242-246 provide a new plan for the taxation of life insurance companies, substantially similar to the plan embodied in the revenue act of 1918 as first adopted by the Senate. The provisions of the present law applicable to life insurance companies are imperfect and productive of constant litigation. The proposed plan would tax life insurance companies on the basis of their investment income from interest, dividends, and rents, with suitable deductions for expenses fairly chargeable against such investment income. The new tax would take the place of the present income and excess-profits taxes for the year 1921, and life insurance companies would share with other insurance companies in the repeal in the year 1922 of the capital stock tax and the taxes imposed by section 503. The new tax will yield a larger revenue than the taxes which it is proposed to replace."

4. The Conference Report on the Revenue Bill of 1921 stated as follows (67th Cong., 1st Sess., House Report No. 486, pp. 39-41):

"Amendment No. 463: The House inserted in the bill a section providing for a new system of taxing life insurance companies, beginning with the calendar year 1922. The Senate amendment made the new system of taxing life insurance companies begin with the year 1921; and the House recedes.

Amendment No. 464: The House bill made the new system of taxing life insurance companies also

applicable to other kinds of insurance companies. The Senate, by this amendment, made the scheme applicable only to life insurance companies and by amendment No. 495 provided a still different method of taxing certain other insurance companies; and the House recedes.

* * * * * *

Amendment No. 495: The House bill provided specifically that every insurance company not exempt under the provisions of section 231 shall make a return for the purposes of this act. As section 239 provides that corporations (including insurance companies) subject to taxation under Title II shall make returns, Senate amendment No. 495 strikes out the above provision of the House bill as surplusage and provides a new system of taxing insurance companies (other than life or mutual insurance companies). The Senate amendment defines the term 'gross income' of such companies to mean the combined gross amount earned during the taxable year from investment income and from underwriting income computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners. 'Expenses incurred' are defined to mean all expenses shown on the aforementioned annual statement approved by the National Convention of Insurance Commissioners; but for the purpose of computing taxable net income only those expenses specifically allowed may be deducted. The House recedes with an amendment making clerical changes."

SUPREME COURT OF THE UNITED STATES.

No. 356.—October Term, 1931.

The United States of America, Petitioner, *vs.* Home Title Insurance Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 14, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

Respondent filed returns in respect of capital stock taxes for the years ending June 30 in 1923, 1924 and 1925 under § 1000 of the Revenue Act of 1921 and § 700 of the Revenue Act of 1924.[1] The first two reported taxes due. In the other respondent claimed to be an insurance company taxable under § 246 and consequently exempt from the capital stock tax. It made returns and paid income taxes for the calendar years 1921 to 1925 inclusive. In February, 1926, respondent paid under protest the capital stock taxes. It made application for refund and, that being denied, brought this action in the district court for eastern New York to recover the amounts so exacted. The parties submitted the case on an agreed statement of facts. The court gave judgment for the United States. 41 F. (2d) 793. The Circuit Court of Appeals reversed. 50 F. (2d) 107.

The question is whether during the periods for which the capital stock taxes were paid, respondent was an insurance company taxable only under § 246.

Respondent was organized in 1906 under Article V of the New York Insurance Law. It was formed to examine and guarantee title to real estate, to lend money on real estate mortgages and to guarantee such mortgages as to payment of principal and interest and to do the work generally of a title insurance company. It is

[1]Section 1000 of the Act of 1921 is the same as § 700 of the Act of 1924. Section 246 is the same in both Acts. Pertinent provisions of both are printed in the margin of our opinion in No. 355, pp. — —, and need not be repeated here.

under the supervision of the state superintendent of insurance, subject to the laws applicable to title and credit guaranty corporations and maintains the required guaranty fund.

Its business has always consisted of issuing two kinds of contracts: (1) those in which it merely guarantees title and (2) those in which it guarantees (a) title to real estate covered by a mortgage and (b) payment of principal and interest of the debt. Preliminary to the issue of title insurance policies first mentioned, respondent prepared abstracts and made examination of the title. Its charges were based upon a scale dependent upon the amounts of the policies and included fees for examinations, searches and other service incident to the transaction. Policies guaranteeing both title and payment of such mortgage debts were issued substantially as follows. When respondent received an application for a loan, it made an appraisal of the property and an examination of the title. Upon its approval of the application, it received from the borrower his bond and mortgage and paid him the amount of the bond less charges for services incidental to title insurance and also for inspection and appraisal of the property. The fee covering title insurance was made a condition of every loan. Respondent did not charge any lending fee.

It sold the loans at face value and delivered to the purchaser of each a mortgage guaranty or, in case of the sale of part of a loan, a participation certificate. By every such guaranty or certificate, the purchaser appointed respondent his agent to collect principal and interest of the loan, and the latter guaranteed (1) the mortgage to be a valid first lien upon a good and marketable title in fee, (2) payment of principal when collected and in any event within 12 months after maturity and (3) payment of interest at a rate usually one-half of one per cent. less than that specified in the bond. The difference was called premium. Generally about two months elapsed between the making of loans and their sale. The interest for that period was retained by respondent and constituted a part of its gross income.

It never held nor sold mortgages that were not acquired and guaranteed as above stated and never guaranteed other than those controlled by it. Its expenses were not assigned to its different classes of business, and its assets were used indiscriminately in connection with all its activities. Corporations organized under

New York banking laws and subject to the supervision of the banking department are authorized to make mortgage loans and sell them with guaranties such as those given by respondent and from 1921 to 1925 at least two companies thus organized and supervised were engaged in that business.

Respondent's policies merely guaranteeing title amounted to more than six times its mortgage guaranties. A tabular statement in the margin makes the comparison.[2] Its title insurance, not connected with mortgage guaranties, outstanding in each of the five years amounted to more than $100,000,000. Another table[3] states its gross income from sources other than interest, rents, dividends and profits on sale of bonds, and classifies such income so as to show: (1) the difference between interest received and that guaranteed by respondent; (2) fees and charges attributable to mortgage guaranties; (3) fees and charges attributable to title insurance where respondent did not make nor guarantee mortgages or loans; (4) compensation for guaranteeing mortgages to be first liens upon titles in fee; (5) income from mortgage renewals; etc.

The guaranty of payment of the principal and interest of mortgage loans constitutes insurance. *Bowers* v. *Lawyers Mortgage*

[2]Column 1 shows the amount of policies merely guaranteeing titles and column 2 shows the amount of mortgage guaranties.

	1.	2.
1921	$29,090,650	$4,359,346
1922	46,050,180	7,319,246
1923	67,138,820	7,989,950
1924	69,442,530	11,341,239
1925	87,965,580	13,214,092

	1921	1922	1923	1924	1925
(1) Mortgage guaranty premiums	$90,449.14	$105,750.03	$134,349.66	$175,641.39	$227,869.98
(2) Inspection and appraisal fees	88,679.75	139,830.45	115,658.86	133,549.10	149,830.35
(3) Title insurance fees where no mortgage guaranty	270,030.79	406,019.93	565,155.86	576,771.36	714,949.06
(4) Title insurance fees where mortgage guaranty also	131,243.75	206,945.45	171,172.14	197,649.23	221,745.05
(5) Mortgage renewals	28,940.83	39,123.35	30,557.75	24,745.35	44,779.75
(6) Conveyancing fees	13,544.25	26,008.93	27,779.00	33,668.40	35,340.67
(7) Charges for searches	3,693.77	6,497.46	7,945.91	11,398.30	14,749.09
(8) Recording fees	3,316.28	4,094.43	6,723.69	6,133.14	9,252.70
(9) Charges for surveys	392.45	326.80	569.20	1,339.65	1,993.25
Total	$630,291.01	$925,596.83	$1,059,912.07	$1,160,895.92	$1,420,509.85
Other income	75,167.80	103,223.94	156,721.05	209,926.81	240,544.43
Total income	$705,458.81	$1,028,820.77	$1,216,633.12	$1,370,822.73	$1,661,054.28

Company, p. —. The amounts received as compensation for insuring title, for guaranteeing that mortgages are first liens and for guaranteeing payment constitute the larger part of respondent's income. And, when there are added the fees and charges for examination of title, appraisals, and other services incident to its insurance business, the total properly assignable to that business amounts to more than 75 per cent. of all respondent's income. Undeniably insurance is its principal business. Indeed, it does not appear that any substantial part of its transactions was not connected with or the outgrowth of insurance. The admitted facts clearly show that in the tax years above mentioned respondent was an "insurance company" within the meaning of that phrase as commonly understood and as used in the Revenue Acts of 1921 and 1924. It was taxable under § 246 and therefore exempt from capital stock taxes.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.